# SP Setia Bhd v Gasing Height Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIIES WINDING UP NO D8–28–173 OF 2000

ABDUL HAMID MOHAMAD J

12 AUGUST 2000

***Companies and Corporations*** *— Winding up — Petition under s 218 — Striking out — Documents in support of petition not tendered through affidavits — Whether documents can be attached to petition instead — Petition not founded on judgment — Dispute of debt to be made at hearing of petition — Whether application to strike out notice and petiton before hearing of petition was abuse of process of court*

The respondent filed a notice of motion praying for an order that the notice under s 218 of the Companies Act 1965 be struck out and in the alternative that the petition be struck out. The respondent submitted, inter alia: (i) the petition was invalid because all the evidence intended to be relied on in support of the petition were not tendered through affidavits, but were attached to the petition itself; and (ii) the s 218 notice was not founded on any judgment, order or award, that the petitioner was 'capitalizing interest', that the 'agreed liquidated damages' must be proved, that the petitioner had commenced the calculation of interest on the wrong date, that the petitioner had breached the settlement agreement and that the respondent had valid cross-claim.

**Held**, dismissing the notice of motion:

(1) Rule 22 of the Winding Up Rules 1972 provides that every petition for the winding up of a company should be in the prescribed form with such variations as circumstances may require. Form 2, inter alia, requires the petitioner to set out the facts on which the petitioner relies to support his petition. In the present case, the particulars of debt and the non-compliance with the s 218 notice were such facts on which the petitioner relied to support his petition. Therefore there was nothing wrong in attaching such documents including the s 218 notice to the petition (see p 120B–C).

(2) Where a petition is not founded on a judgment, the respondent is always at liberty to dispute the alleged debt. If it can be shown that there is a bona fide dispute to the debt, the court will not make a winding up order. But that is done at the hearing of the petition. This was an application to strike the petition even before the petition was heard. The only ground on which the petition may be struck out is where the petition is frivolous, vexatious and/or an abuse of the process of the court. The court found that the respondent's application was an abuse of the process of court (see p 120H–I).

**[Bahasa Malaysia summary**

Responden telah memfailkan satu notis usul memohon untuk mendapatkan perintah bahawa notis di bawah s 218 Akta Syarikat 1965 hendaklah dibatalkan dan secara alternatifnya bahawa petisyen itu hendaklah dibatalkan. Responden berhujah, antara lainnya: (i) petisyen tersebut tidak sah kerana semua keterangan yang diharapkan bagi menyokong petisyen tersebut telah tidak dikemukakan melalui afidavit-afidavit tetapi telah dilampirkan kepada petisyen itu sendiri; dan (ii) notis s 218 tersebut telah tidak diasaskan pada mana-mana penghakiman, perintah atau award, bahawa pempetisyen sedang memodalkan faedah (capitalizing interest), bahawa ganti rugi boleh ditentukan yang dipersetujui (agreed liquidated damages) mestilah dibuktikan, bahawa pempetisyen telah mula menghitung faedah pada tarikh yang salah, bahawa pempetisyen telah memungkiri perjanjian penyelesaian dan bahawa responden mempunyai tuntutan balas yang sah.

**Diputuskan**, menolak notis usul tersebut:

(1) Kaedah 22 Kaedah-Kaedah Penggulungan 1972 memperuntukkan bahawa setiap penggulungan sesebuah syarikat patut dibuat dalam borang yang telah ditetapkan dengan perubahan-perubahan sedemikian seperti mana yang mungkin diperlukan. Borang 2, antara lain, menghendaki pempetisyen membentangkan fakta-fakta di atas yang mana pempetisyen bergantung bagi menyokong petisyennya. Dalam kes ini, butir-butir hutang dan ketidakpatuhan dengan notis s 218 tersebut merupakan fakta-fakta sedemikian di atas yang mana pempetisyen telah bergantung bagi menyokong petisyennya. Oleh itu, adalah tidak salah melampirkan dokumen-dokumen yang sedemikian termasuk notis s 218 kepada petisyen tersebut (lihat ms 120B–C).

(2) Di mana sesuatu petisyen tidak berasaskan sesuatu penghakiman, responden selalunya bebas untuk mempertikaikan hutang yang dikatakan itu. Jika dapat ditunjukkan bahawa terdapatnya pertikaian bona fide kepada hutang tersebut, mahkamah tidak akan membuat perintah penggulungan. Tetapi pertikaian begini hanya dilakukan semasa perbicaraan petisyen tersebut. Ini merupakan satu permohonan untuk membatalkan petisyen tersebut sebelum petisyen itu didengar. Satu-satunya alasan di mana petisyen tersebut boleh dibatalkan adalah di mana petisyen tersebut adalah remeh, menyusahkan dan/atau merupakan satu penyalahgunaan proses mahkamah. Mahkamah mendapati bahawa permohonan responden sememangnya satu penyalahgunaan proses mahkamah (lihat ms 120H–I).]

**Notes**

For cases on petition under s 218 generally, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1049–1062.

**Cases referred to**

*Buildcon-Cimaco Concrete Sdn Bhd v Filotek Trading Sdn Bhd* [1999] 4 CLJ 135 (refd)

*Richard Pitt (Richard) & Sons Pty Ltd, Re* (1978-80) 4 ACLR 459 (refd)

*United Malayan Banking Corp Bhd v Palm & Vegetable Oils (M) Sdn Bhd* [1983] 1 MLJ 206 (refd)

**Legislation referred to**

Companies Act 1965 s 218
Companies (Winding Up) Rules 1972 r 22, Form 2
Rules of the High Court 1980 O 18 r 19

*T Gananathan* (*Mohd Izral* with him) (*Logan Sabapathy & Co*) for the petitioner.

*Joy W Appukuttan* (*Jo HL Tiong* with him) (*SK Yeoh & Jeganathan*) for the respondent.

**Abdul Hamid Mohamad H.** : The petitioner filed this petition on 28 February 2000. It was fixed for hearing on 25 May 2000. However, on 24 March 2000 the respondent filed a notice of motion praying for an order that:

(1) The notice under s 218 of the Companies Act 1965 be struck out; and, in the alternative.

(2) That the petition be struck out.

(The third prayer was abandoned.)

I dismissed the application on 10 May 2000.

This application was made under the court's inherent jurisdiction. I had, in the case of *Buildcon-Cimaco Concrete Sdn Bhd v Filotek Trading Sdn Bhd* [1999] 4 CLJ 135 discussed this issue at length. I shall not repeat. I decided this case on the basis that this court had the power to hear this application pursuant to the inherent jurisdiction of this court.

Learned counsel for the respondent argued that the petition was invalid. He said that a winding-up petition was to be conducted by way of affidavit evidence. All the evidence intended to be relied on in support of the petition must be properly tendered through affidavits. In this case, the petitioner attached these documents, including the s 218 notice, to the petition itself. That was bad and the petition should be struck out because, in his own words 'A petition by itself did not and could in law, affirm or tender 'documents as evidence', he argued.

In purported support of his argument he referred to *United Malayan Banking Corp Bhd v Palm & Vegetable Oils (M) Sdn Bhd* [1983] 1 MLJ 206

(FC) in which Raja Azlan Shah Ag LP (as he then was) said '… we cannot but observe that any defect or omission in the statement of claim cannot be made good by affidavit evidence …'.

I just cannot see how that statement can be said to support his argument.

Learned counsel for the petitioner referred to r 22 of the Companies (Winding Up) Rules 1972 which provides that every petition for the winding-up of a company should be in the prescribed form with such variations as circumstances may require. Form 2, inter alia, requires the petitioner to set out the facts on which the petitioner relies to support his petition.

I agree with his submission that the particulars of debt and the non-compliance with the s 218 notice are such facts on which the petitioner relies to support his petition. I therefore see nothing wrong in attaching such documents including the s 218 notice to the petition.

It was further argued that the affidavit verifying the petition did not refer to the documents attached to the petition, but only to the petition. Therefore, they were no documentary evidence to support the petition. This again, is a very trivial argument. Clearly as it refers to the petition, it refers to the petition and whatever documents attached to it.

Perhaps I should round up the discussion on these issues by quoting a passage from the decision of Cosgrove J in *Re Richard Pitt (Richard) & Sons Pty Ltd* (1978-80) 4 ACLR 459 (Supreme Court of Tasmania):

> A petition is an application in the nature of a pleading and the Rules of the Supreme Court of Tasmania therefore apply to it. It must therefore contain 'a statement as concise as the nature of the case will admit, setting out the material facts on which the party relies for his claim'. It should contain all necessary particulars. But a petition differs from a statement of claim, in that it must be verified by affidavit. The allegations of fact thereby become evidence.

The second part of the respondent's submission was that the Respondent disputed the alleged debt. It was argued that the s 218 notice was not founded on any judgment, order or award, that the petitioner was 'capitalising interest', that the 'agreed liquidated damages' must be proved, that the petitioner had commenced the calculation of interest on the wrong date, that the petitioner had breached the settlement agreement and that the respondent had valid cross-claim.

I shall not delve in these issues. This is not the forum for that. It must be remembered that where a petition is not founded on a judgment, the respondent is always at liberty to dispute the alleged debt. If it can be shown that there is a bona fide dispute to the debt, the court will not make a winding up order. But, that is done at the hearing of the petition. This is an application to strike out the petition before even the petition is heard. The only ground on which the petition may be struck out is where the petition is frivolous, vexations and/or an abuse of the process of the court.

This application once again supports my view that the procedure to strike out a winding-up petition, be it under O 18 r 19 of the Rules of the

A High Court 1980 ('the RHC') or under the inherent jurisdiction of the court should not be allowed to be used in a proceeding for a winding up. This is because a winding-up proceeding is different from a writ action. In a winding up proceeding, where, as in this case, the petition is not founded on a judgment, at the hearing of the petition, so long as it can be shown that there is a bona fide dispute to the alleged debt, the petition will be B dismissed. What the court has to decide at the hearing of the petition in such a case (also in this case) is similar to what the court has to decide at the hearing of an application to strike out a writ and statement of claim under O 18 r 19 of the RHC 1980 or the inherent jurisdiction of the court. When, as in this case, even before petition is heard, an application is made to strike C out the petition, what is the court supposed to do? Decide whether there is a bona fide dispute to the debt? That is a matter to be decided at the hearing of the petition.

To me, this application is an abuse of the process of the court. The same arguments can and should be forwarded at the hearing of the petition. The petition would have been heard on 25 May 2000. But because of the D application, and this (and may be further) appeal we do not know when the petition will be heard. Clearly, the respondent has succeeded to delay the hearing of the petition.

(For detailed discussion of this topic see *Buildcon-Cimaco Concrete Sdn Bhd*).

E It was also argued that the s 218 notice and the petition were not consistent. The s 218 notice, it was said, was founded on an alleged breach of the settlement agreement whereas the petition was founded on an alleged breach of building contract. Very detailed arguments were put forward. Again, I shall not decide that in this application. That is matter to be argued and decided at the hearing of the petition.

F On these grounds I dismissed the notice of motion with costs.

*Notice of motion dismissed.*

Reported by Jafisah Jaafar

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